PUBLIC PROSECUTOR v. LAM KIM PAU & 6 OTHERS.

[Crim. Trial (Laville, J.) May 12, 1948]
[J.B. — Crim. Case No. 60/1947]

Criminal Procedure Code Ss. 190, 197 — Chap. XXI — Whether or not Assessors form part of the Court — Essential differences between trial with Assessors and trial by Jury — B.M.A. Proclamation No. 50, s. 3(i).

In this case the accused were charged under section 3 (i) of Proclamation No. 50 B.M.A. Gazette No. 7 dated 5th February 1946 which reads as follows: — "Section 3 (i): Any person who carries arms shall on conviction be punishable with death or with penal servitude for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to a fine." At the conclusion of the case for the prosecution the Counsel for the Defence, before submitting that there was no case to meet, requested the Judge to ask the Assessors to leave the Court before he made his submission.

Held, (1) that Assessors do not form part of the Court but are ancillary to it and that their proper function is to enable the presiding Judge at the end of the case to fortify his opinion by their joint agreement or by agreement of one of them, and where the agreement is not forthcoming the law demands, as a matter of caution, that the Judge should not act on his own unsupported opinion, but order a retrial; (2) that Assessors should not be in Court when a submission made under s. 190 of the Criminal Procedure Code is argued and the submission is based on facts in issue in the trial.

CRIMINAL TRIAL.

W. M. McCall for the Public Prosecutor.

M. Ismail for the Respondents.

Laville, J. : — The question of whether the Assessors who sit with the presiding Judge to try cases involving a death sentence form part of the Court or not is one which has come up for consideration in many recent cases in this Court. I have held in several cases that they do not form part of the Court, but are ancillary to it and their proper function is to enable the presiding Judge at the end of the case to fortify his own opinion by their joint agreement or by the agreement of one of them, and where that agreement is not forthcoming the law demands, as a matter of caution, that the Judge should not act on his own unsupported opinion, but order a retrial.

The essential difference between trial with Assessors and trial by Jury is that a Jury actually does try the case and its decision on fact is binding on the trial Judge, but Assessors do not try the case, but the Judge does and his decision in effect is binding on the Assessors since, if he disagrees with them, it is his decision which prevails, subject to the safeguard of another trial.

Chapter XXI of the Criminal Procedure Code sets out the procedure of a trial with Assessors. It is to be noted at the start that in this Code, Court is defined, *inter alia,* as the Court of a Judge, and the chapter under discussion empowers such a Court to choose Assessors; it is not laid down that they are part of the Court. In a trial by Jury the Court does not choose the Jury which is chosen by lot by the Registrar.

The only function of an Assessor which is laid down by law is that set out in Section 197 of the Criminal Procedure Code, that is, at the conclusion of the case (and not before), to state orally his opinion. It is noteworthy that it is not legally incumbent on the trial Judge either to explain the law to the Assessors or to sum up the evidence. The chapter is completely silent on the first point, and in regard to the second permits the Judge to do so if it seems good to him.

Section 190 of the Code lays down the procedure to be followed by the Judge at the close of the prosecution. It casts on him the grave *onus* of deciding whether the case so far made out is one which warrant a conviction, and, if he decides that it does not, he shall — the term is mandatory — record an order of acquittal.

If the matter was one for the Assessors or for their opinion at this stage, the legislature would have laid it down, as it has laid it down in regard to the concluding stage of the trial in Section 197. But there is in Section 190 complete absence of mention as to any consultation with the Assessors or any recording of their opinion. It is difficult to see how the trial Judge at this stage could effectively consult the Assessors or ask their opinion. If he does so and their opinion is contrary to his, what is he to do? Must he ignore their opinion and go on with the trial, or in the opposite case ignore their opinion and acquit the accused? Unless he is to be guided by their opinion in some way, it seems pointless to consult them at this stage, and it is impossible to see what aid they can give him then.

It is for this reason that it seems to me incumbent on the trial Judge, when a submission is made under Section 190 of the Criminal Procedure Code, and is, as it must be, argued on the facts disclosed in the evidence, to request the Assessors to leave the Court while the argument proceeds.

I hold therefore that where at the end of the prosecution a submission is made that the Court should act under Section 190 of the Criminal Procedure Code and the submission is based on facts in issue in

the trial, the Assessors should not remain in Court while the submission is argued.

It is part of the duty of a Judge at the conclusion of a trial to impress on the Assessors that they must come to their own decision on the facts and must not be influenced by any opinion the Judge may express on facts.

In deciding a submission of this nature the trial Judge must necessarily disclose his opinion on the facts of the case as far as it has gone and, if the Assessors are present, they would naturally tend to be influenced by that decision in their judgment on the facts of the whole case, if it proceeds further, and for this reason they should not be in Court.

Order Accordingly.

LIM KIM CHUAN v. PUBLIC PROSECUTOR.

[App. Cr. Juris. (Callow, J.) April 2, 1948]
[Seremban — Cr. App. No. 2 of 1948]

Rubber Supervision Enactment, S. 5(i) and S. 31 — Inadmissible evidence — Conviction — Police Investigations, when begun.

There were six grounds of appeal in five of which it was contended that the learned Magistrate erred in law in admitting hearsay evidence which was inadmissible. It was also contended in one of the grounds of appeal that the statement made to the police in the course of a police investigation was wrongly admitted and the point was made as to when the investigation should be deemed to have begun.

Held, (a) that a conviction following the admission of inadmissible evidence is not necessarily bad, where there is sufficient admissible evidence on the record to enable the Court to come to the finding it did; (b) that where a statement is made to a Police Officer in the course of the investigation it is immaterial whether the offence is seizable or non-seizable; (c) that once the suspicion of a Police Officer has been aroused to such an extent as to cause him to proceed to any action, then investigation has been commenced.

Cases referred to:—

(1) *Fong Sai Mun three others v. Public Prosecutor*, 1931-1932 F.M.S.L.R. 41.

(2) *Vellasamy v. R.*, (1941) M.L.J. 235.

MAGISTRATE'S APPEAL.

Rintoul for the Appellant.

Kilner, D.P.P., for the Respondent.

Callow, J. : — This is an appeal from the Court of the Magistrate, Jelebu, sitting at Jelebu against the conviction which resulted in a fine of $500 or 3 months r.i. in default of payment for purchasing rubber without a licence, thereby committing an offence contrary to section 5(i) of the Rubber Supervision Enactment and punishable in accordance with the provisions of section 31 of the said Enactment.

The grounds of appeal are as follows:—

(a) The Learned Magistrate erred in Law in admitting Evidence of what the witness KOH SUI (First Prosecution witness) was told by a certain Malay when such Malay was not called as a witness by the Prosecution.

(b) The Learned Magistrate erred in Law in admitting Evidence of what the witness KOH SUI (First Prosecution witness) was told by a woman, who alleged that she sold scrap rubber to the Accused when no steps were taken to indicate who such woman was.

(c) The Learned Magistrate erred in Law in admitting evidence of what a certain man (not called by the Prosecution or identified) told the witness KOH SUI regarding the sale of 300 Katties of scrap rubber.

(d) The Learned Magistrate erred in Law in admitting evidence of what a certain Lorry Attendant told the witness Wong Ying Hee (Second Prosecution witness) when such Lorry Attendant was not called as a witness.

(e) The Learned Magistrate erred in Law in admitting in Evidence what the Accused was alleged to have said to the witness Koh Sui.

(f) The Finding of the Learned Magistrate was against the weight of Evidence in that it disregards the Evidence of the witnesses Siow Thian Fatt (Third Prosecution witness) and Lee Ngee (Fourth Prosecution witness).

Grounds (a), (b), (c) and (d) all refer to the admission of evidence described by learned Counsel for the appellant as hearsay, and in respect of (a), (c) and (d) there can be no doubt at all of the inadmissibility thereof.

In ground (a) the first prosecution witness Koh Sui after saying that he "noticed a Malay carrying rubber scraps into a lorry", a piece of evidence which is perfectly admissible, went on to say what this man told him — "I asked him whose rubber it was". He said that it belonged to a Chinese living at Kuala Klawang. The "Kuala Klawang Chinese had bought the scraps from another Chinese living nearby". Had this been said in the presence of the accused, whom it would seem is referred to as the Chinaman from Kuala Klawang, it might, given certain premises, have been to some extent admissible, but in his absence, and there is nothing in the record to suggest otherwise, it is clearly flagrant hearsay.

Ground (c) is even more glaring. The record of the evidence of the same witness Koh Sui reads: "One man told me that he had "sold 300 katties of scraps to the Chinese purchaser", and the accused is pointed out as the purchaser. If this man had been called as a witness no possible objection could have been raised had he said this on oath and subjected himself to cross-examination; he was indeed material, but to give evidence of what he is alleged to have said reflects